Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

STACEY ELAINE WODARSKI,

Petitioner,

v.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the United States District Court err in ruling that the definition of coverage in the applicable universal nationwide general commercial liability insurance policy did not afford coverage of a sexual harassment judgment?

Should the Oklahoma Supreme Court decide the applicability of an insurance policy to a sexual harassment judgment before the United States District Court rules on the merits when there exists a split in authority between the Federal and State Courts in Oklahoma?

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OPINIONS BELOW

This Petition for Certiorari arises from the order and judgment of the Tenth Circuit Court of Appeals dated October 18, 1995, (App. 1-7) affirming the summary judgment entered against the Petitioner/Defendant by the United States District Court for the Northern District of Oklahoma dated October 27, 1994, (App. 8); summary judgment entered against the Petitioner/Defendant by the United States District Court for the Northern District of Oklahoma dated October 27, 1994, (App. 9-15); and denial of Petitioner/Defendant's Motion to Certify by United States District Court of the Northern District of Oklahoma dated October 27, 1994. (App. 16).

JURISDICTION

This Court has jurisdiction to review the final orders and judgments of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. §1254(1). Furthermore, this Court has jurisdiction to vacate the orders and judgments below and order reconsideration of Petitioner's case pursuant to the Court's supervising powers under 28 U.S.C. §2106.[1]

[1] **28 U.S.C. §2106.** Determination. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FEDERAL STATUTES INVOLVED

28 U.S.C. §1254(1)
28 U.S.C. §1332
28 U.S.C. §2106

STATEMENT OF THE CASE

A. Introduction.

Stacey Elaine Wodarski ("Wodarski") was employed by Lloyds Property Management Corp. ("Lloyds") as a property manager under the direction of David Zarecki ("Zarecki"). Wodarski had sexual relations with Zarecki under the threat of termination of her employment. She became pregnant and gave birth to Zarecki's child. Zarecki was judicially determined to be the father of Wodarski's child.

On January 23, 1992, Wodarski filed her Petition as a plaintiff against Lloyds and Zarecki in the Oklahoma District Court for Tulsa County alleging injury due to Lloyds' and Zarecki's joint torts against Wodarski consisting of battery, intentional infliction of severe emotional distress, outrage, and also sexual harassment. Lloyds and Zarecki failed to respond to Wodarski's Petition in any manner, either by themselves, through counsel, or through Lloyd's insurer, American Manufacturers Mutual Insurance Company ("AMM"). On September 29, 1992, a hearing was held in the District Court of Tulsa County before Judge Sharron Kay Bubenik at which testimony was taken from Wodarski and a report by Judith K. Adams, Ph.D. was received into evidence. Subsequent to

the September 29, 1992, hearing, Judge Bubenik entered an order on October 23, 1992, reciting the fact of the default of Zarecki and Lloyds in that case, noting that that court had jurisdiction of the parties and the subject matter and awarding damages against Lloyds and Zarecki jointly and severally in an amount of $757,000.00 together with attorneys' fees and costs and interest thereon.

When Wodarski attempted to collect judgment from AMM, AMM declined to honor the claim and brought this declaratory judgment suit against Wodarski and other defendants to determine its liability under a certain comprehensive and commercial liability insurance policy.

AMM claims in this case that the Policy in question provided no coverage for Wodarski's judgment. Wodarski denied all these allegations and claimed the Policy in fact provided coverage for her judgment.

As it was undisputed that the application and interpretation of the Policy in this case would be governed by Oklahoma law, Wodarski filed a motion with the United States District Court to certify a question concerning the potential liability of AMM to Wodarski and other defendants under the Policy in this case under Oklahoma law. Wodarski argued in that motion that no case of the Oklahoma Supreme Court had specifically addressed the liability of an insurance company under the particular policy language in question in the circumstances involved in this case.

On October 27, 1994, the United States District Court entered its final judgment granting AMM's Motion for Summary Judgment determining that the Policy provided

no coverage for the judgment obtained by Wodarski pursuant to the Order filed on that same date in which the Court made determinations of Oklahoma law and denied Wodarski's Motion to certify questions to the Oklahoma Supreme Court.

B. Statement of Facts.

Subject matter jurisdiction in the United States District Court was based upon diversity of citizenship, Title 28 U.S.C. §1332. The amount in controversy exceeded $50,000. AMM is an Illinois corporation with its principal place of business in that State. Wodarski is a citizen of the State of Oklahoma.

The liability Policy itself covered the general liability of Lloyds throughout the United States including its properties located in Oklahoma and other states. The Policy governs the liability of AMM for acts of Lloyds and Zarecki, a Lloyds employee.

REASONS FOR GRANTING THE WRIT

The Oklahoma Supreme Court has not ruled on the applicability of the "Intended Injury Exclusion" in the circumstances of the present case. That fact was specifically noted in an *Allstate Insurance Co. v. Thomas*, 684 F.Supp. 1056 (W.D. Okla. 1988), a case which involved criminal child abuse, unlike the present case. There is a split among the various State and Federal courts that have addressed the question. See *Willard v. Kelly*, 803 P.2d 1124 (Okla. 1990); *Republic National Life Insurance v.*

Johnson, 317 P.2d 258 (Okla. 1957); *Commercial Union Ins. Co. v. Sky*, 810 F.Supp. 249, 253 (W.D. Ark.1992); *Old Republic Ins. Co. v. Comprehensive Health Care Assoc. Inc.*, 786 F.Supp. 629 (N.D. Tex.1992); *Sena v. Travelers Ins. Co.*, 801 F.Supp. 471, 475 (D.N.M.1992); *Altena v. United Fire and Casualty Co.*, 422 N.W.2d 485 (Iowa 1988); *Western National Assurance Co. v. Hecker*, 719 P.2d 954 (Wash.App.1986); and *Aetna Life and Cas. Co. v. Barthelemy*, 33 F.3d 189 (3d Cir. 1994).

Oklahoma law is clear, however, that such intent cannot be inferred and the specific intent of a tortfeasor to commit the specific injury incurred by a tort victim must be shown by evidence for the "Intended Injury Exclusion" to apply. *Lumbermen's Mutual Insurance Co. v. Blackburn*, 477 P.2d 62 (Okla. 1970) requires both an intentional act and the intent to commit the specific injury for such a clause to apply to exclude coverage. However, in the instant case, the United States District Court ruled it unnecessary to answer this question because in the case of *Massachusetts Bay Insurance Co. v. Gordon*, 708 F.Supp. 1232 (W.D. Okla. 1989), the United States District Court for the Western District of Oklahoma found that if an injury is simply caused by an intentional act, an "occurrence"[2] could not occur for purposes of an

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[2] "Occurrence" is defined in Form WK-1271-1, p.2, as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. "Occurrence" is defined in paragraph 9, page 10 of Section V of form CG 00 01 to mean an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

"intended injury" exclusion clause.[3]

The United States District Court should have certified the question of the applicability of the "Intended Injury Exclusion" in the present case because it appears

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[3] In *Massachusetts Bay Insurance Company v. Gordon*, supra, relied on by the District Court below, the Defendant obtained a judgment against a homeowner for battery for having beaten him up and repeatedly saying to him "I'm going to kill you." The plaintiff sought a declaratory judgment to have the homeowner's liability policy held inapplicable to such judgment because it was caused by an intentional act. The defendant argued that specific injuries had to be intended, pursuant to *Blackburn*. The District Court held *Blackburn* inapplicable because the policy in that case did not refer specifically to an accident and the Court found that no "accident" within the applicable policy could occur, purporting to follow various Oklahoma cases which, it found, held there could be no accident if the act itself was intended.

In so ruling, the District Court for the Western District of Oklahoma overlooked the clear holding of state court cases such as *Willard v. Kelly*, 803 P.2d 1124 (Okla. 1990) and *Republic National Life Insurance v. Johnson*, 317 P.2d 258 (Okla. 1957) (death by gunshot wound is "accidental" even though intentionally inflicted by another, unless intentionally inflicted by the insured as aggressor and if the injuries were foreseeable by him, as where injuring party also has a gun), which clearly stand for the proposition that, under Oklahoma law, "even if an insured becomes a victim of an intentional act, the nature of the injury is nonetheless viewed as accidental", 803 P.2d at 1129. These cases make clear that even to the extent, apparently relied on by the District Court below, that courts are reluctant to find an "accident" where, as here, it was the insured who was the perpetrator of the tortious act, the specific injuries involved must still be foreseeable by the perpetrator. No Oklahoma authority suggests the extreme view espoused by the District Court in the present case that once an act is shown to be intentional the intent to cause the specific injury becomes wholly irrelevant.

that there is developing two separate lines of cases concerning the applicability of that clause under Oklahoma law, depending on whether the cases are decided in Federal, instead of Oklahoma State Court. See *Allstate Insurance Company v. Hisely,* 465 F.2d 1243 (10th Cir. 1972); *Massachusetts Bay Insurance Co. v. Gordon,* supra, *Lumbermen's Mutual Insurance Co. v. Blackburn,* supra.

The Oklahoma state court cases leave no doubt that it is improper to infer that a specific injury has been intended within the meaning of the "Intended Injury Exclusion" for that clause to apply. The sole basis for the United States District Court's failure to certify that question was the ruling by the Federal District Court in *Massachusetts Bay Insurance Co. v. Gordon,* purporting to apply Oklahoma law. The Oklahoma courts should have an opportunity to decide this question in the present case.

Erie Railroad v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), clearly requires the Federal Courts not to create a Federal common law in diversity cases and to follow the law of the controlling State jurisdiction. Inasmuch as the Federal courts appear to be doing precisely the opposite of that which is mandated in *Erie* in connection with cases posing the issues involved in the present case, it is particularly important that Oklahoma law be clarified to prevent an abuse of the fact that state courts have no direct way of policing Federal courts' obligations under *Erie Railroad v. Tompkins* other than for plaintiffs to appeal such to the United States Supreme Court.

Alternatively, the United States District Court erred in ruling that the insurance policy did not cover Zarecki's

and Lloyd's actions. This conclusion is contrary to the great weight of evidence in this case.

CONCLUSION

Public policy in the United States is to afford individuals with a place of employment which is free of "sexual harassment". To allow sexually harassed employees to attain judgment for their injuries but allowing the employer's insurance carrier to escape payment of said judgments, *de facto* nullifies the employee's main remedy, i.e. monetary judgment, and is therefore contrary to public policy.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, an Illinois corporation,	)	
Plaintiff-Appellee,	)	
v.	)	No. 94-5224 (D.C. No. 93-C-825-K) (N.D. Okla.)
STACEY ELAINE WODARSKI, an individual,	)	
Defendant-Appellant,	)	(Filed Oct. 18, 1995)
and	)	
LLOYDS PROPERTY MANAGEMENT CORPORATION, a Delaware corporation; SWITLYK PROPERTIES & LIMITED PARTNERSHIPS, a New Jersey corporation; DAVID ZARECKI, an individual,	)	
Defendants.	)	

ORDER AND JUDGMENT*

Before KELLY, SETH, and HENRY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendant Stacey Elaine Wodarski appeals from a declaratory judgment that an insurance policy issued by plaintiff American Manufacturers Mutual Insurance Company (AMM) to Lloyds Property Management Corp. did not provide coverage for a judgment Ms. Wodarski obtained against Lloyds and one of its employees, David Zarecki. The issues are whether the district court erred in ruling the injuries giving rise to the judgment were not "occurrences" under the policy and whether it should have certified to the Oklahoma Supreme Court a question of state law. Ms. Wodarski also moves this court to certify a question of state law to the Oklahoma Supreme Court. We deny the motion to certify and affirm the district court's judgment.

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Lloyds owned and/or managed several properties in Tulsa, Oklahoma. Mr. Zarecki was Lloyds's employee. Lloyds employed Ms. Wodarski to manage one of its apartment complexes. She was given an apartment rent-free as part of her compensation.

On two occasions Mr. Zarecki forced Ms. Wodarski to have sex with him, threatening her with termination of her employment if she did not. After she became pregnant with Mr. Zarecki's child,[1] Lloyds fired her. Although she was rehired, Lloyds eventually fired her a second time and evicted her from her apartment.

Ms. Wodarski brought a state court action against Mr. Zarecki and Lloyds, alleging sexual harassment, assault and battery, and intentional infliction of severe emotional distress or outrage. She obtained a $757,000 default judgment.

AMM, which insured Lloyds and Switlyk Properties, commenced the present action, seeking a declaration that its policy does not provide coverage for Ms. Wodarski's judgment. On the parties' cross-motions for summary judgment, the district court concluded that because Mr. Zarecki's acts were intentional, Ms. Wodarski's injuries were not "occurrences" under the policy and therefore were not covered. Alternatively, it concluded that Ms. Wodarski could not recover because she was an employee of the insured when the events took place and the policy's employment exclusion therefore applied. It granted AMM's motion for summary judgment.

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[1] Ms. Wodarski later obtained a judgment declaring Mr. Zarecki to be the father of the child.

We review the grant of summary judgment de novo, applying the same standard as the district court. *Universal Money Ctrs., Inc. v. AT&T*, 22 F.3d 1527, 1529 (10th Cir.), *cert. denied*, 115 S. Ct. 655 (1994). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(c)). We examine the factual record and reasonable inferences therefrom in the light favorable to the non-moving party. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the law. *Id.*

As a federal court sitting in diversity, we ascertain and apply Oklahoma law[2] to reach a result that would have been reached had the case been decided in Oklahoma state court. *See Leadville Corp. v. United States Fidelity & Guar. Co.*, 55 F.3d 537, 539 (10th Cir. 1995). The district court's interpretation of state law is reviewed de novo. *Id.*

Under Oklahoma law, if the terms of an insurance policy are clear, consistent, and unambiguous, they are accepted in their ordinary sense and enforced to carry out the parties' expressed intent. *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla. 1993). If the contract terms are susceptible of two meanings (i.e., ambiguous), words of inclusion are liberally construed in favor of the insured,

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[2] It is undisputed that Oklahoma law governs this case.

while words of exclusion are strictly construed against the insured. *Id.* The interpretation of an insurance contract and whether it is ambiguous are questions of law. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991).

The policy provides, "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies. . . . The 'bodily injury' . . . must be caused by an 'occurrence.' " Appellant's App. at 93. "Occurrence" is defined in the policy as an accident. *Id.* at 102, 105, 119. While the term "accident" is not defined in the policy, in Oklahoma the term has "long been held to describe an occurrence which is unexpected, unintended and unforeseen *in the eyes of the insured.*" *Willard v. Kelley*, 803 P.2d 1124, 1128-29 (Okla. 1990); *see also Republic Nat'l Life Ins. Co. v. Johnson*, 317 P.2d 258, 261-62 (Okla. 1957) (defining "accident" as "[a]n event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event, chance, contingency.") (quotation omitted).

Mr. Zarecki's and Lloyds's[3] act of forcing Ms. Wodarski to have sex upon threat of losing her job was not "unexpected, unintended and unforeseen" from their perspective. Therefore, their act was not an "accident," Ms. Wodarski's injuries were not caused by an "occurrence," and the policy does not provide coverage. *Cf. Culp v. Northwestern Pac. Indem. Co.*, 365 F.2d 474, 477 (10th Cir. 1966) (finding employee's intentional assault and battery

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[3] Mr. Zarecki's acts were attributable to Lloyds as he was Lloyds's agent.

not an "accident" within meaning of employer's insurance policy and thus not covered by policy).

Ms. Wodarski argues that to conclude there was no "occurrence" merely because Mr. Zarecki's and Lloyds's acts were intentional, without examining whether they intended to cause her injuries, would be inconsistent with *Lumbermens Mut. Ins. Co. v. Blackburn*, 477 P.2d 62 (Okla. 1970). In *Blackburn*, the plaintiff was injured by a hard object thrown by several schoolmates. He commenced an action against the insurance carrier of one of the schoolmates. The relevant insurance policy provided that the insurer would pay on behalf of the insured "all sums which the latter shall become legally obligated to pay as damages because of bodily injury," but excluded bodily injury intentionally caused by the insured. *Id.* at 64. The court construed the policy exclusion to apply only if the tortfeasor-insured had intended to inflict the injury actually inflicted. *Id.* at 65. Because it was stipulated that he had not so intended, the court concluded the exclusion did not apply, even though his actions had been intentional. *Id.* at 66.

Blackburn does not apply here because AMM's policy limits coverage to an "accident" and the policy in *Blackburn* did not contain such a provision. *See Massachusetts Bay Ins. Co. v. Gordon*, 708 F. Supp. 1232, 1233 (W.D. Okla. 1989). The issue in this case, as in *Gordon*, is whether the policy applies "in the first instance," *id.*, not whether the exclusion for intentionally caused injuries applies.

However, even if Mr. Zarecki's and Lloyds's intent to cause Ms. Wodarski's specific kind of bodily injury is relevant, *Blackburn* is readily distinguishable. There, the

parties stipulated that the defendant did not intend to injure the plaintiff. *Blackburn*, 477 P.2d at 66. Here, Ms. Wodarski's state court petition against Mr. Zarecki and Lloyds specifically alleged that their actions "intentionally caused the Plaintiff severe emotional distress." Appellant's App. at 19. This is the only bodily injury she claims to have suffered. *Id.* at 57-58. The record is devoid of any evidence contradicting this allegation, and the state court granted a default judgment on the claim. Thus, we conclude the record establishes that Mr. Zarecki and Lloyds did intend to cause the bodily injury that Ms. Wodarski suffered.

In light of our conclusion, we see no need to certify a question of state law to the Oklahoma courts.[4] Further, we express no opinion as to the district court's alternative ground for its decision – that the policy's employment exclusion applied. We do not address any of the other issues raised by AMM.

The motion to certify is DENIED. The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

Robert H. Henry
Circuit Judge

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[4] We also see no error in the district court's refusal to do so.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, an Illinois corporation,	)	
Plaintiff,	)	No. 93-C-825-K
v.	)	
STACEY ELAINE WODARSKI, et al.,	)	(Filed Oct. 27, 1994)
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of the plaintiff's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the plaintiff and against the defendant. The insurance policy in question does hot provide coverage for the judgment obtained by Wodarski against Lloyds in state court action no. CJ-92-389 in Tulsa County District Court.

ORDERED this 26 day of October, 1994.

/s/ Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, an Illinois corporation,	)	
Plaintiff,	)	No. 93-C-825-K
v.	)	
STACEY ELAINE WODARSKI, et al.,	)	(Filed Oct. 27, 1994)
Defendants.	)	

ORDER

The Court has before it for consideration (1) Plaintiff's Motion for Summary Judgment and (2) Defendant Wodarski's Motion for Summary Judgment.

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any materia! fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. *Adickes v. Kress,* 90 S.Ct. 1598 (1970). In *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court Stated that:

> Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Id. at 322, 106 S.Ct. at 2552. To survive a motion for summary judgment, non-movant "must establish that there is a genuine issue of material facts . . . " Non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

The Court has reviewed the pleadings and filings in this action, including the Stipulation of Facts and Suggested Questions of Law submitted to the Court on February 28, 1994, and finds, construing the pleadings liberally in favor of the party opposing summary judgment and considering all factual inferences tending to show triable issues, that material issues of fact do not remain to be litigated.

Undisputed Facts:

American Manufacturers Mutual Insurance Company ("AMM"), the plaintiff, is an Illinois corporation which provided various insurance coverages to its insureds, Lloyds Property Management Corporation and Switlyk Properties & Limited Partnerships. AMM brought this action for a declaratory judgment to determine its liability under a certain comprehensive and commercial liability insurance policy for the period February 27, 1988 to February 27, 1989. The commercial general liability coverage form contained the following pertinent provision whereby AMM would pay on behalf of the insured those sums which the insured became legally obligated to pay

as damages because of "bodily injury"[1] to which the insurance applies, during the policy period and which must be caused by an "occurrence."[2] However, the policy also contained an exclusion providing that the above liability clause did not apply to "bodily injury" expected or intended from the standpoint of the insured [Form CG 00 01, Section I(2)(a)] nor "bodily injury" to an employee of the insured arising out of and in the course of employment by the insured [Form CG 00 01, p.2, Section I – Coverages, paragraph (2)(e)(1). The policy further provided coverage for "personal injury" arising out of one or more enumerated offenses.[3]

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[1] "Bodily injury" is defined in Section V, paragraph 3 of form CG 00 01 as bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

[2] "Occurrence" is defined in Form WK-1271-1, p.2, as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. "Occurrence" is defined in paragraph 9, page 10 of Section V of form CG 00 01 to mean an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[3] Form CG 00 01, Section V – Definitions, p.10-11, paragraph (10): "Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;
b. Malicious prosecution;
c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

The parties have stipulated that Wodarski filed a separate action in the District Court of Tulsa County against Lloyds Property Management Corp. and David Zarecki, Case No. CJ-92-0389. Wodarski alleged that as Property Manager for Madison Avenue Apartments in Tulsa, Oklahoma, she occasionally came in contact with Defendant Zarecki, an executive of Lloyds Property Management Corporation. She further alleges that on two occasions in April, 1988, Zarecki committed assault and battery on her person, and threatened her with termination of her employment if she did not engage in sex with him. Wodarski complied. Wodarski subsequently became pregnant, informed Defendant Zarecki of such, but he refused to acknowledge any responsibility. Later Wodarski was fired, but a few months after the child was born, Wodarski resumed her position as Property Manager. However Wodarski was again fired on June 9, 1989 by Defendants and removed from her manager apartment to a smaller 2-bedroom apartment. After securing a Judgment from Tulsa County District Court establishing the paternity of her child, Wodarski filed the stipulated-to action in Tulsa County District Court. Thereafter, the District Court awarded Wodarski a default judgment against Defendants Lloyds and Zarecki in the amount of $750,000 for her claims of sexual harassment, assault and battery and intentional infliction of severe emotional distress or outrage, in the sum of $7,000 for back pay, but denied her claim of front pay and reserved the issue of attorney fees and costs.

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e. Oral or written publication of material that violates a person's right of privacy.

The transcript of hearing held September 29, 1992, in the District Court of Tulsa County Case No. CJ-92-389 was, by stipulation, made a part of the record. Wodarski's uncontradicted testimony was that Defendant Zarecki as an agent for Lloyds Property Management Corp. intentionally committed an assault and battery upon Wodarski, inflicting severe emotional and mental distress.

Defendant Wodarski's initial argument is that there appears to be no determinative or controlling definitive precedent governing disposition of the case at bar, and this Court should certify the question to the Supreme Court of Oklahoma. Alternatively, she moves for summary judgment in her favor. In response, pursuant to the terms, conditions, exclusions and other provisions of the subject policy, AMM contends it affords no coverage nor has any obligation under the subject policy for Wodarski's claims or default judgment later rendered against Zarecki and Lloyds Property. AMM's argument is three-part: (1) the judgment obtained in state court was based upon intentional acts of the insured; (2) Ms. Wodarski did not experience "bodily injury" caused by an "occurrence," or a "personal injury"; (3) the policy does not provide coverage for damages sustained by an employee of the insured.

In *Allstate Ins. Co. v. Thomas*, 684 F. Supp. 1056 (W.D. Okla.1988), the court stated that in order for an intentional act exclusion to result in a denial of coverage in Oklahoma, two elements must be shown: (1) the insured must have intended to commit the act and (2) the insured must intend to commit the injury or harm which resulted. *Id.* at 1058. In support of this proposition, the court cited *Lumbermens Mutual Ins. Co. v. Blackburn*, 477 P.2d 62

(Okla.1970), a case upon which defendant heavily relies. The court in *Thomas* went on to find the intent to commit injury could be inferred as a matter of law in a case of sexual abuse. Defendant Wodarski argues that Oklahoma has ruled only in cases involving nonconsensual sexual assaults on minors, and that *Thomas* is so limited.

"Most courts have found sexual molestation to be intentional and excluded from insurance coverage as a matter of law." *Commercial Union Ins. Co. v. Sky,* 810 F.Supp. 249, 253 (W.D.Ark.1992). To the same effect are *Old Republic Ins. Co. v. Comprehensive Health Care Assoc. Inc.*, 786 F.Supp. 629 (N.D.Tex.1992) and *Sena v. Travelers Ins. Co.*, 801 F.Supp. 471, 475 (D.N.M.1992). The distinction between molestation of a child and an adult, for which defendant argues, presents a split of authority. *See Altena v. United Fire and Casualty Co.*, 422 N.W.2d 485 (Iowa 1988) (inferred intent applies despite adult victim); *Western National Assurance Co. v. Hecker,* 719 P.2d 954 (Wash.App.1986) (same). *Contra, Aetna Life and Cas. Co. v. Barthelemy,* 33 F.3d 189 (3d Cir.1994). The Supreme Court of Oklahoma has not addressed the issue.

However, in *Massachusetts Bay Ins. Co. v. Gordon,* 708 F.Supp. 1232, 1233-34 (W.D.Okla.1989), the court further distinguished *Blackburn* by noting the language in the policy before the Oklahoma Supreme Court did not limit coverage to an "occurrence" or "accident". The court in *Gordon* went on to conclude that if the insured performs a voluntary act, the natural, usual, and to-be-expected

result is not an accident.[4] This Court finds the acts perpetrated against the defendant Wodarski constitute intentional acts and therefore her injuries were not the result of an "occurrence" and are not covered under the policy. The Court need not certify the question of inferred intent to the Supreme Court of Oklahoma because it is not necessary to this conclusion. Also, another basis exists for finding lack of coverage.

Plaintiff asserts Wodarski may not recover because she was an employee of the insured when the events took place, and thus the policy's employment exclusion applies. Defendant responds that, because the sexual acts took place after work hours and at Zarecki's house, the injuries sustained by Wodarski did not arise out of and in the course of her employment. Again, the Court agrees with plaintiff. The events in question had the employer-employee relationship as their matrix, which was the essence of Wodarski's testimony in obtaining the default judgment. The situs of the sexual conduct does not alter this conclusion. *Cf. Aberdeen Ins. Co. v. Bovee*, 777 S.W.2d 442 (Tex.Ct.App.1989); *Omark Industries v. Safeco Ins. Co.*, 590 F.Supp. 114, 120 (D.Or.1984).

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is granted and that Defendant Wodarski's Motion for Summary Judgment is denied. Defendant Wodarski's motion to certify question to the

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[4] Much of the "overwhelming" Oklahoma authority cited by defendant, such as *Lincoln Health & Accident Insurance v. Johnigan*, 147 P. 837 (Okla.1926), involves policies which excluded coverage for intentional acts *against* the insured, not on the part Of the insured as in the case at bar.

Supreme Court of Oklahoma is denied. Defendant Wodarski's motion to strike plaintiff's response to motion for summary judgment is denied.

So ORDERED this 26 day of October, 1994.

/s/ Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY,
STATE OF OKLAHOMA

STACEY ELAINE WODARSKI, Plaintiff,	)	
-vs-	)	CASE NO. CJ 92-0389
LLOYDS PROPERTY MANAGEMENT CORP., a Delaware corporation, and DAVID ZARECKI, individually, Defendants.	)	(Filed Oct. 23, 1992)

ORDER

This matter came on for hearing on a motion of the plaintiff for a default judgment. Plaintiff appeared and was represented by Clifford A. Ribner. Defendants David Zarecki and Lloyds Property Management Corporation did not appear and were not represented by counsel. Upon testimony of plaintiff and the representation of Judith K. Adams, Ph.D., the Court makes the following findings of fact and conclusions of law:

1. The defendants, David Zarecki and Lloyds Property Management Corp, were served and had notice of this hearing;

2. The Court has jurisdiction of the parties and the subject matter;

3. On plaintiff's motion for default judgment on claims of sexual harassment, assault and battery, and intentional infliction of emotional distress or outrage, the Court grants judgment in the amount of $750,000.00

against both defendants, jointly and severally;

4. Plaintiff's claim for back pay is granted in the sum of $7,000.00, and plaintiff's claim for front pay is denied;

5. The Court reserves the issue of attorney fees and costs pending an affidavit in support of plaintiff's motion or application for same.

IT IS SO ORDERED.

/s/ Sharron Bubenik
SHARRON BUBENIK,
DISTRICT JUDGE